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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVIE RODNEY PAYNE,

Defendant and Appellant.

E046033

(Super.Ct.No. FSB045401)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. W. Robert Fawke and Bryan Foster, Judges. Affirmed in part and reversed in part with directions.

Patricia L. Brisbois, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Peter Quon and Elizabeth A. Hartwig, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant was convicted by a jury of: (1) first degree robbery (count 1; Pen. Code, § 211);¹ two counts of false imprisonment (counts 2-3; § 236); assault with a deadly weapon (count 4; § 245, subd. (a)(2)); and receiving stolen property (count 5; § 496, subd. (a)). The jury also found true sentence enhancement allegations that he personally used a firearm as to counts 1 through 4. (§§ 12022.5, subd. (a), 12022.53, subd. (b).) He was sentenced to an aggregate term of 24 years 4 months in prison.

Defendant contends: (1) the court prejudicially erred by failing to instruct the jury as to the People's burden of proving guilt beyond a reasonable doubt just prior to deliberations; (2) the sentences on count 2 (false imprisonment) and count 4 (assault with a deadly weapon) should be stayed pursuant to section 654; and (3) the conviction on count 5 (receiving stolen property) should be reversed because he cannot be convicted of stealing and receiving the same property. The People disagree with the first two contentions, but agree with defendant as to the third. We hold that any error in the timing of the court's reasonable doubt instruction was harmless, that the sentence on count 2, but not the sentence on count 4, must be stayed pursuant to section 654, and agree with both sides that the conviction on count 5 must be reversed.

I. FACTUAL SUMMARY

On the morning of May 19, 2004, Marcus Brassfield (Marcus) was staying at his mother's house in Colton. Marcus's mother was married to a man named Henry. No one else was at the home that morning.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

Marcus awoke to the sound of knocking at the front door. When he answered the door, defendant and an accomplice forced their way into the house, with the accomplice pointing a gun at Marcus's stomach. One or both of the assailants pushed Marcus to the floor, tied him up with plastic zip ties, and struck him in the head. Defendant sat on Marcus's back pointing a gun at him while the accomplice ran upstairs and began ransacking the house. The two said they were looking for Henry because Henry owed them money. Marcus did not know where Henry was. Defendant and the accomplice took turns searching and ransacking the house. Marcus saw the men take a computer, a safe, and a Play Station 2 from the upstairs area of the house. The telephone lines were pulled out of the wall or cut.

During the robbery, Marcus's sister, Sheneka Brassfield (Sheneka), came to the house. Marcus tried to tell his sister that someone was in the house, but defendant's accomplice hit him. Sheneka walked into the house through the front door. Defendant pointed a gun at her, grabbed her, put her on the floor next to Marcus, and tied her hands and feet with zip ties. Defendant took earrings, rings, and two cell phones from her. The robbers asked her: "[W]here [is] Henry?" and "'Where's the money? Where's the dope?'" When Marcus asked Sheneka where her son was, defendant used the gun to hit Marcus on his head and face.

After the two men left, Marcus and Sheneka cut the zip ties that bound them and went to a neighbor's house, where they called 911.

When the police arrived, they found the house ransacked. A safe had been pried open and was empty and a computer appeared to be missing from an upstairs room. Sheneka reported that a computer, a television, jewelry, and cell phones had been taken. Marcus had cuts and welts on his face and head. He received five stitches for a cut on his head.

Approximately six weeks later, on July 2, 2004, Colton police officers searched the home of Sonia Angrum on Elmwood Road in San Bernardino. During the search of Ms. Angrum's Elmwood residence, the police found the computer that had been stolen from the Brassfield residence. Department of Motor Vehicles records showed that defendant lived at this address as of February 2004.

Defendant testified in his defense. He said he engaged in marijuana transactions with Henry and would meet with Henry near the Colton house where the robbery occurred, but he had never been inside the house. He admitted he had lived with Ms. Angrum at the house where the computer was found, but not in May, June, or July 2004. He denied any involvement in the subject robbery.

II. ANALYSIS

A. Timing of Reasonable Doubt Instruction

Defendant contends the court violated the federal constitutional guarantee of due process by failing to instruct the jurors immediately prior to deliberation as to the People's burden of proving each element of the offenses beyond a reasonable doubt. As we explain below, because the court fully instructed the jury as to the People's burden of

proof and the reasonable doubt standard during trial, there is no federal constitutional error. Any error in the timing of the instruction was an error of state law and reversible only if the error was prejudicial under the *Watson*² standard. We hold that no such prejudice has been shown.

1. Background

Jury selection in this case began on July 12, 2006. Prior to juror voir dire, the court informed the prospective jurors of the People's burden of proving each allegation and charge beyond a reasonable doubt.³ After the courtroom clerk read the charges asserted against the defendant, the court added: "Ladies and gentlemen, you have now

² *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*).

³ The court stated: "The burden in a criminal case is: As I've indicated, the defendant has pled not guilty, and that places the burden on the People to prove each allegation and charge beyond a reasonable doubt.

"I'm going to read you a reasonable charge instruction that gives you an example of what reasonable doubt is.

"The fact that a criminal charge has been filed against a defendant is not evidence that the charge is true. You must not be biased against the defendant just because he has been arrested, charged with the crime or brought to trial.

"A defendant in a criminal case is presumed to be innocent. This presumption is required of the People to prove each element of the crime and special allegation beyond a reasonable doubt.

"Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise.

"Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt, because everything in life is open to some possible or imaginary doubt.

"In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that is received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty."

heard the charges that have been filed by the District Attorney. As you heard, the defendant has entered a not-guilty plea to each and every charge and all of the special allegations, which places the burden on the People to prove each charge and allegation to you beyond a reasonable doubt.” Later, after the court questioned the prospective jurors, it again informed them as to the People’s burden of proving each allegation and charge beyond a reasonable doubt.⁴

Jury selection was completed and the jury sworn on July 13, 2006. The prosecution began its case-in-chief that afternoon with two witnesses testifying.

Following a weekend break, trial resumed on July 17, 2006. That morning, the court gave the jurors certain instructions, including Judicial Council of California Criminal Jury Instructions, CALCRIM No. 103, as follows: “I will now explain the

⁴ The court informed them as follows: “Ladies and gentlemen, the burden in a criminal case is—as I’ve indicated, the defendant has pled not guilty, and that places the burden on the People to prove each allegation and charge beyond a reasonable doubt.

“I’m going to read you a reasonable charge instruction that gives you an example of what reasonable doubt is:

“The fact that a criminal charge has been filed against a defendant is not evidence that the charge is true. You must not be biased against the defendant just because he has been arrested, charged with the crime, or brought to trial. A defendant in a criminal case is presumed to be innocent. This presumption requires the People to prove each element of the trial, crime and special allegation, beyond a reasonable doubt. Whenever I tell you that the People must prove something, I mean they must prove it beyond a reasonable doubt, unless I specifically tell you otherwise.

“Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt, because everything in life is open to some possible or imaginary doubt.

“In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that is received throughout the entire trial, unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty.”

presumption of innocence and the People's burden of proof: The defendant has pled not guilty to the charges. The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial. [¶] A defendant in a criminal case is presumed to be innocent. This presumption requires the People to prove each and every element of the crime and special allegations beyond a reasonable doubt. And whenever I tell you the People have to prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise. [¶] Proof beyond a reasonable doubt is proof that leaves with you an abiding conviction that the charge is true. [¶] The evidence need not eliminate all possible doubt, because everything in life is open to some possible or imaginary doubt. In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal, and you must find him not guilty." The court also told the jurors: "After you've heard all of the evidence and before the attorneys have given their final arguments, I will instruct you on the law that applies to the case."

The presentation of evidence concluded during the morning session of July 18, 2006. That afternoon, prior to closing arguments, the court further instructed the jury. The court began by telling the jurors that it "will now instruct [them] on the law that applies to this case," and that they would receive "a copy of the instructions to use in the

jury room.” The court informed the jury that the People had the burden of proving the elements of the crimes charged and the enhancement allegations. The court did not give CALCRIM No. 220 concerning reasonable doubt.⁵ The court did instruct the jurors as to the People’s burden of proof beyond a reasonable doubt in limited contexts. In the context of evaluating identification testimony, for example, the court informed the jury that “[t]he People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime,” and that if “the People have not met this burden, you must find that the defendant is not guilty.” The jurors were further instructed as to the People’s burden of proof beyond a reasonable doubt in the context of evaluating circumstantial evidence, determining the requisite mental state, and proving the degree of robbery. Although it appears from the reporter’s transcript that each of the jurors were given a copy of the jury instructions, the clerk’s transcript does not include a copy of the

⁵ CALCRIM No. 220 provides: “The fact that a criminal charge has been filed against the defendant[s] is not evidence that the charge is true. You must not be biased against the defendant[s] just because (he/she/they) (has/have) been arrested, charged with a crime, or brought to trial. [¶] A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt [unless I specifically tell you otherwise]. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant[s] guilty beyond a reasonable doubt, (he/she/they) (is/are) entitled to an acquittal and you must find (him/her/them) not guilty.”

instructions. Nor can we determine from our record whether the copy of instructions given to the jurors included either CALCRIM No. 103 or CALCRIM No. 220 or both.

Defendant did not object to the failure to give CALCRIM No. 220 and neither of the attorneys discussed the burden of proof during closing arguments.

The jury deliberated for approximately two hours (not including a two-hour lunch break) before reaching their verdicts. They made one request to see certain evidence—Department of Motor Vehicles forms, the zip ties that had bound Marcus and Sheneka, a “six pack” photographic lineup that was used in identifying defendant, and a “property release.” They asked no questions of the court during their deliberations.

2. Analysis

The “Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” (*In re Winship* (1970) 397 U.S. 358, 364.) Consequently, “[t]he prosecution bears the burden of proving all elements of the offense charged, [citation], and must persuade the factfinder ‘beyond a reasonable doubt’ of the facts necessary to establish each of those elements, [citations.]” (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278.) Moreover, the trial court must sua sponte instruct the jury as to the People’s burden of proof and the reasonable doubt standard. (*People v. Vann* (1974) 12 Cal.3d 220, 225-226 (*Vann*).)

Defendant contends he was deprived of due process because the court failed to instruct the jury as to these principles. He relies upon a line of cases in which our state

Supreme Court and Courts of Appeal reversed convictions when the trial courts failed to fully instruct on the reasonable doubt standard during trial, even though the standard was discussed in specific contexts by counsel during argument, or prior to impaneling the jury. (See *Vann, supra*, 12 Cal.3d at pp. 226-228 [burden of proof explained during jury selection and at closing argument]; *People v. Flores* (2007) 147 Cal.App.4th 199, 212-214, 219 [reasonable doubt defined during jury selection and mentioned during prosecutor's closing argument; burden of proof stated in instructions on elements of crimes]; *People v. Phillips* (1997) 59 Cal.App.4th 952, 954-955, 958 [burden of proof mentioned during jury selection and contained in elements of crime, and counsel gave partial definitions of reasonable doubt in closing argument]; *People v. Crawford* (1997) 58 Cal.App.4th 815, 819-820, 826 [reasonable doubt defined during jury selection; burden of proof referred to in other instructions]; *People v. Elguera* (1992) 8 Cal.App.4th 1214, 1217-1219, 1224 [reasonable doubt defined during jury selection; burden of proof referred to in closing arguments].)

None of the cited cases are on point. In contrast to each of these cases, the trial court in this case did give a full, complete instruction concerning the People's burden of proof and the reasonable doubt standard to an impaneled jury. CALCRIM No. 103, given the day before the close of evidence, is essentially indistinguishable from CALCRIM No. 220.⁶ The language used in the instruction fulfills the constitutional

⁶ The only difference between CALCRIM No. 103 as given and CALCRIM No. 220 is that CALCRIM No. 103 includes the following prefatory language: "I will now
[footnote continued on next page]

requirement of informing the jurors of the People's burden of proof beyond a reasonable doubt. (See *People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088 [discussing CALCRIM No. 220].) Thus, the issue presented under these facts is not, as defendant contends, whether the court failed to instruct the jury as to reasonable doubt, but whether the failure to repeat the instruction after the close of evidence was prejudicial error.

Section 1093 sets forth the order in which a trial shall proceed. Subdivisions (a) through (e) describe in chronological order the reading of the accusatory pleading by the clerk, the giving of opening statements, the presentation of evidence, and the making of closing arguments. Subdivision (f) then provides, in part: "The judge may then charge the jury, and shall do so on any points of law pertinent to the issue, if requested by either party; and the judge may state the testimony, and he or she may make such comment on the evidence and the testimony and credibility of any witness as in his or her opinion is necessary for the proper determination of the case and he or she may declare the law. At the beginning of the trial or from time to time during the trial, and without any request from either party, the trial judge may give the jury such instructions on the law applicable to the case as the judge may deem necessary for their guidance on hearing the case."

Section 1094 provides that the trial court may depart from the usual order of trial set forth in section 1093 "for good reasons, and in the sound discretion of the Court" Section 1093 thus contemplates that the court will instruct the jury on the law pertinent to the

[footnote continued from previous page]

explain the presumption of innocence and the People's burden of proof: The defendant has pled not guilty to the charges."

case following the close of evidence, and section 1094 makes clear that the court has discretion to depart from that order when there are “good reasons” to do so.

These statutes were discussed in *People v. Valenzuela* (1977) 76 Cal.App.3d 218 (*Valenzuela*). In that case, after opening statements, the court instructed the jury concerning the credibility of witnesses. (*Id.* at p. 220.) Following closing arguments, the court gave final instructions to the jury, but did not repeat the instructions regarding witness credibility. (*Ibid.*) After quoting from section 1093, subdivision (f), and section 1094, the court stated: “We glean from these statutes two rules: First, *when* to instruct a jury is a matter within the sound discretion of the trial judge; he may instruct at any time during the trial. Second, even when a party requests instructions at the close of argument, if the court has already instructed on the subject it may in its sound discretion refuse to reinstruct. This necessarily follows from the broad discretion vested in the trial court by virtue of section 1094.” (*Valenzuela, supra*, at p. 221.) Notwithstanding such discretion, the court cautioned: “[R]egardless of the discretion vested in the trial judge not to instruct after closing argument, we express a caveat: the judge must always be alert to the possibility that counsel in the course of argument may have befuddled the jury as to the law. If this occurs, then either at the time the confusion arises or as part of the final instructive process the judge should rearticulate the correct rule of law. Just as the law imposes a *sua sponte* obligation to instruct on certain principles of law in the first place (those rules openly and closely connected with the case) so does it impose on the judge a

duty to reinstruct on the point if it becomes apparent to him that the jury may be confused on the law.” (*Ibid.*)

Under the circumstances in *Valenzuela*, where three days had elapsed between the preinstruction and closing arguments in which counsel argued at length concerning the credibility of the witnesses, the court held that “the trial court should have exercised its discretion within the bounds of caution by taking the time required to reread the instructions.” (*Valenzuela, supra*, 76 Cal.App.3d at p. 222.) Nevertheless, the court concluded that “any abuse of discretion which might have occurred because of the trial court’s failure to reinstruct on the credibility of witnesses was harmless” under the *Watson* standard for reviewing errors of state law. (*Valenzuela, supra*, at p. 222; see also *People v. Chung* (1997) 57 Cal.App.4th 755, 759 [Fourth Dist., Div. Two] [no error in preinstructing jury where there is no evidence of juror confusion].)

Here, the court gave the reasonable doubt instruction on the morning of July 17, 2008. The presentation of evidence concluded, and the court further instructed the jury the next day. On the morning of July 19, 2008, closing arguments were made, final instructions given to the jurors, and jury deliberations began. There is nothing in the record to indicate that the jurors were confused about the People’s burden of proof or the reasonable doubt standard. The short time between the preinstruction on reasonable doubt and the final instructions given to the jury, and the absence of any apparent juror confusion weigh in favor of finding no error under sections 1093, 1094, and *Valenzuela*.

However, *Valenzuela* is arguably distinguishable because the instruction at issue in that case concerned witness credibility, not the burden of proof and reasonable doubt standard. “[C]ourts in California have generally favored giving burden-of-proof-type instructions at the conclusion of the evidence at trial and before the jury deliberates because it ‘places the concepts at center stage for consideration during deliberations’ and ‘protect[s] an accused’s constitutional right to be judged solely on the basis of proof adduced at trial.’ [Citations.] As one court noted, ‘[i]f any phrase should be ringing in the jurors’ ears as they leave the courtroom to begin deliberations, it is “proof beyond a reasonable doubt.”’ [Citation.]” (*People v. Smith* (2008) 168 Cal.App.4th 7, 16.) In *Vann*, our state Supreme Court stated: “‘No instruction could be more vital . . . , since in every criminal case it directs the jury to put away from their minds [*sic*] all suspicions arising from arrest, indictment, arraignment, and the appearance of the accused before them in his role as a defendant.’ [Citation.]” (*Vann, supra*, 12 Cal.3d at p. 227.)

Because of the critical importance of the reasonable doubt standard, we believe the court should have given the reasonable doubt instruction after the close of evidence, even though it gave the instruction during trial. Although section 1094 gives the court discretion to alter the order of trial proceedings, including the timing of instructing the jury, there must be “good reasons” for doing so. Here, the failure to give the instruction after the close of evidence appears to be due to inadvertence, not because the court had good reasons to omit the instruction.

Any error, however, was an error of state law and, we conclude, harmless under the *Watson* standard. The evidence of defendant's guilt was overwhelming. Marcus and Sheneka unequivocally identified defendant as one of the two men who assaulted them with a gun, bound them with plastic zip ties, physically beat Marcus, and ransacked the house. A computer stolen from the house during the robbery was subsequently found in a residence of a woman with whom defendant lived during or near the time of the robbery. Although defendant denied any involvement in the robbery, he admitted he engaged in drug transactions with Henry, who lived in the victims' house, and that he lived for a time in the residence where the stolen computer was found. The jury asked no questions during deliberations (other than to request certain items of evidence) and deliberated for approximately two hours. Based upon our review of the entire record, we find no reasonable probability that a more favorable result would have been obtained if the court had repeated the reasonable doubt instruction prior to deliberation.

B. Application of Section 654 to Counts 2 and 4

At the sentencing hearing, defendant requested a stay pursuant to section 654 of the sentences imposed for count 2 (false imprisonment of Marcus) and count 4 (assault on Marcus).⁷ The court rejected the request, finding that the crimes and objectives "were predominantly independent of each other and that the crimes . . . involve[d] separate acts . . . of violence or threats of violence." On appeal, defendant asserts there is no

⁷ The trial was conducted before Judge W. Robert Fawke. The sentencing hearing was conducted before Judge Bryan Foster.

substantial evidence to support the court's findings. The false imprisonment and assault of Marcus, he contends, were part of a continuous course of conduct with the single intent and objective of committing the robbery, for which he was sentenced under count 1. We agree with defendant as to the false imprisonment sentence but hold that there is substantial evidence to support the court's finding as to the sentence for assault.

Section 654, subdivision (a) provides, in pertinent part, that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . ." This statute "precludes multiple punishments for a single act or indivisible course of conduct. [Citation.]" (*People v. Hester* (2000) 22 Cal.4th 290, 294.) It is intended to ensure that a defendant's punishment is "commensurate with his culpability." (*People v. Perez* (1979) 23 Cal.3d 545, 551.)

"It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible." (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) If the defendant's crimes "were merely incidental to, or were the means of accomplishing or facilitating one objective, [the] defendant may be found to have harbored a single intent and therefore may be punished only once." (*Ibid.*, citing *Neal v. State of California* (1960) 55 Cal.2d 11, 19.) Multiple punishment is proper, however, where the defendant entertained multiple criminal objectives which were

independent of each other. (*People v. Harrison, supra*, at p. 335, citing *People v. Beamon* (1973) 8 Cal.3d 625, 639.)

Generally, the defendant's intent and objective are factual questions for the trial court, and we will uphold its ruling on these matters if it is supported by substantial evidence. (*People v. Perry* (2007) 154 Cal.App.4th 1521, 1525.) When, however, the relevant facts are undisputed, the application of section 654 is a question of law which we review de novo. (*Neal v. State of California, supra*, 55 Cal.2d at p. 17.)

Here, defendant and an accomplice forced their way into Marcus's residence and immediately forced Marcus to the floor, bound him with plastic ties, hit him with a gun, and held him against his will while the assailants took turns ransacking the house and stealing property. When they were finished, they left the house, leaving Marcus and Sheneka on the floor. The evidence discloses that the intent and objective in keeping Marcus bound and immobile—i.e., falsely imprisoning him—was to facilitate the robbery. The false imprisonment of Marcus was thus merely incidental to the robbery and part of a single, indivisible course of conduct. We agree with defendant that there is no substantial evidence to support a contrary finding. The sentence on count 2 should therefore be stayed pursuant to section 654.

We disagree with defendant, however, as to the applicability of section 654 to the sentence for assault. Defendant and his accomplice initially assaulted Marcus when they entered the house and hit him with the gun. After being bound and held on the ground for some time, Sheneka came to the house and was similarly bound and forced to the

floor. When Marcus asked Sheneka about the whereabouts of her son, defendant hit Marcus again with the gun on his head and face. Defendant argues that this act of violence was committed to further the robbery. Although the court could have drawn that conclusion, the court could also have reasonably concluded that this additional act was a gratuitous act of violence against an unresisting victim. As such, the court could reasonably conclude that the act was not incidental to the robbery for purposes of section 654. (See, e.g., *People v. Sandoval* (1994) 30 Cal.App.4th 1288, 1300; *People v. Nguyen* (1988) 204 Cal.App.3d 181, 193.)

C. Convictions for Receiving and Stealing the Same Property

Defendant was convicted under count 5 for receiving stolen property. He contends that the conviction must be reversed because he was also convicted in count 1 for the theft of the same stolen property—the computer. The People concede this point and agree that the conviction on count 5 must be reversed. We agree. The robbery conviction on count 1 was based, in part, upon defendant’s theft of the computer. The conviction for receiving stolen property was based upon his receipt of the same computer. A person cannot be convicted for both the theft and the receipt of the same property. (*People v. Garza* (2005) 35 Cal.4th 866, 871, 881; *People v. Allen* (1999) 21 Cal.4th 846, 857; *People v. Stephens* (1990) 218 Cal.App.3d 575, 586-587.) Accordingly, we reverse the conviction on count 5.

III. DISPOSITION

The conviction on count 5 is reversed; the sentence imposed on count 2 is stayed pursuant to section 654; in all other respects, the judgment is affirmed. The court shall direct that an amended abstract of judgment be prepared to reflect the reversal of the conviction on count 5 and the stay of the sentence imposed on count 2. The court is directed to send a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

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/s/ King
J.

We concur:

/s/ Richli
Acting P.J.

/s/ Miller
J.